

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

CRAIG M. KELLY

Claimant

VS.

**ASSOCIATED WHOLESALE GROCERS,
INC.**

Self-Insured Respondent

Docket No. 1,046,045

ORDER

STATEMENT OF THE CASE

Claimant requested review of the September 20, 2010, Award entered by Administrative Law Judge Kenneth J. Hursh. The Board heard oral argument on February 9, 2011. Bruce Alan Brumley, of Topeka, Kansas, appeared for claimant. Frederick J. Greenbaum, of Kansas City, Kansas, appeared for the self-insured respondent.

The Administrative Law Judge (ALJ) found claimant did not prove by a preponderance of the credible evidence that his left shoulder problem arose out of and in the course of his employment with respondent. Accordingly, the ALJ denied benefits in this case.

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

Claimant contends he proved that he sustained a repetitive work injury during the course of his employment with respondent.¹ As such, he asserts he is entitled to an award

¹ Claimant's Form WC E-1, Application for Hearing, (filed June 11, 2009) alleged a date of accident of June 1, 2009, caused by "[l]ots of lifting with lifts over and over up to 40-50-pounds" with injuries to his "[c]hest, shoulder, upper back & neck." Claimant subsequently amended his alleged date of accident to May 31, 2009.

for permanent partial disability to his left upper extremity. Claimant asks for an award of 14 percent to his left upper extremity at the level of the shoulder based on the rating of Dr. C. Reiff Brown. In the event the Board finds the ratings of the examining doctors should be averaged, claimant argues that the rating of Dr. Hall should be disregarded because he did not follow the requirement of the *AMA Guides*² to use a goniometer to measure claimant's range of motion.

Claimant also asserts that the medical bills he incurred with Dr. Brown and Dr. Daniel Zimmerman should be ordered paid by respondent as authorized, arguing that it is uncontroverted that claimant asked for medical treatment and respondent denied his claim and told him to see his own doctor. Claimant further asks that respondent be ordered to provide him with future medical and for an award of attorney fees.

Respondent admits that claimant experienced symptoms of dizziness at work on May 31, 2009, but denies claimant injured his shoulder at work on that date or by a series of repetitive traumas. Respondent contends the ALJ correctly determined that claimant failed to meet his burden to prove he met with personal injury by accident arising out of and in the course of his employment on May 31, 2009. In the event the Board finds claimant suffered a compensable injury, respondent argues that claimant's impairment should be limited to a 7 percent impairment to the left upper extremity as per the rating of Dr. Hall. Respondent also argues that claimant is not entitled to be reimbursed for the medical bills of Drs. Zimmerman and Brown, either as authorized or unauthorized medical.

The issues for the Board's review are:

- (1) Did claimant sustain an accidental injury arising out of and in the course of his employment with respondent?
- (2) If so, what was the nature and extent of his disability?
- (3) Should claimant's medical bills incurred with Drs. Zimmerman and Brown be ordered paid by respondent as either authorized or unauthorized medical?
- (4) Is claimant entitled to future medical?
- (5) Is claimant entitled to attorney fees?

² American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

FINDINGS OF FACT

Claimant worked for respondent as a warehouse associate order puller. In his job, he would lift items weighing from less than 1 pound to items weighing 80 to 90 pounds. He would stack items on pallets up to a height of seven feet.

On Sunday, May 31, 2009, claimant was pulling an order when he started feeling dizzy and incoherent. He did not notice that he had any pain. He reported his problems with dizziness and incoherence to his supervisor, stating that something was wrong. His supervisor called an EMT, Lynn Hurt, who took claimant's blood pressure and gave him a urinalysis and breathalyzer test. Claimant was given the option of going to the emergency room or going home, and claimant decided to go home.

Claimant testified that after he went home and rested, he began to feel some soreness in his left shoulder. The next morning, June 1, claimant's left shoulder was swollen. Claimant was normally off work on Mondays and Tuesdays; nevertheless he attempted to contact his supervisor several times during that period to let him know about his sore, swollen shoulder. When claimant went back to work on Wednesday, June 3, he went to see Dave Turner, respondent's supervisor of safety, and told him about his left shoulder. Mr. Turner told claimant he would need to see his personal physician for his shoulder problem. Claimant testified that Mr. Turner said if his doctor thought claimant's problem was work-related, respondent might take care of it. At that point, claimant hired an attorney.

Claimant's attorney sent him to Dr. Daniel Zimmerman, a board certified independent medical examiner. Dr. Zimmerman saw claimant on July 2, 2009. In taking a history, claimant told him that he was pulling orders at work when he became incoherent and lightheaded. Claimant told Dr. Zimmerman he went to his supervisors office, and then went home and relaxed. Claimant told Dr. Zimmerman that the next day he had left shoulder pain and swelling in the pectoral area. Claimant told Dr. Zimmerman that his chief complaint was pain and discomfort affecting his left shoulder and left trapezius musculature. He complained of continued pain in the shoulder, as well as reduced strength in his left arm.

X-rays of the left shoulder taken at the time of the examination demonstrated osteoarthritic change affecting claimant's left acromioclavicular joint. During examination, claimant was shown to have pain and discomfort, range of motion restrictions, and weakness affecting the left shoulder. After examining claimant, taking a history and reviewing the x-rays, Dr. Zimmerman opined that claimant developed pain and discomfort affecting the left shoulder and left trapezial musculature in carrying out repetitive work duties in his employment as an order filler for respondent. Dr. Zimmerman did not believe claimant was at maximum medical improvement (MMI). He recommended that claimant be treated with steroid injections and local anesthetic. He also recommended physical therapy.

Dr. Zimmerman opined that the symptoms claimant was having were from a permanent aggravation of osteoarthritis affecting the acromioclavicular joint of claimant's left shoulder. He also opined that claimant had chronic tendonitis affecting the left shoulder joint capsule. He relates claimant's condition and aggravation to his work injury. He did not attach any significance to the fact that claimant's symptoms of pain did not start until the next day. Dr. Zimmerman said that it is "quite common that you inflame soft tissues and that the symptoms associated with the inflammation of the soft tissue take a few hours to develop because it takes the swelling associated with the inflammation of the soft tissues to cause the pain."³

After being notified by claimant's attorney that claimant had decided not to seek treatment for his shoulder, Dr. Zimmerman, using the AMA *Guides*⁴, rated claimant as having a 12 percent permanent partial impairment of the left upper extremity at the level of the shoulder for range of motion limitations. Dr. Zimmerman recommended that claimant restrict his lifting to 20 pounds occasionally and 10 pounds frequently. Dr. Zimmerman also said that claimant should not work at shoulder height or above using his left arm. He opined that claimant could work within those restrictions.

Dr. C. Reiff Brown is a retired orthopedic surgeon. At the request of claimant's attorney, he evaluated claimant on September 11, 2009. Claimant gave him a history that on May 31, 2009, it was necessary for him to move boxes of produce weighing up to 80 pounds. In the course of that work, he became aware that something was wrong with his shoulder. Claimant told Dr. Brown that he was not functioning right. Claimant denied having pain or a feeling of something tearing or giving way in his shoulder. Claimant told Dr. Brown that the next day he woke up with some swelling and a feeling of tightness and discomfort on movement of his left shoulder. On returning to work, he was having discomfort in the muscles of the upper aspect of the shoulder as well as in the muscles in the front of the shoulder extending down into the chest. He reported the symptoms to his supervisor, who told him to see his family doctor, but because he did not have medical insurance, he did not pursue active treatment. Since the injury, claimant avoided movement of the joint, which has allowed the symptoms to stay the same. Claimant told Dr. Brown he had an achy pain in the front and upper aspect of the left shoulder with movement. His pain was particularly severe when raising his hand above shoulder level or reaching at arm's length away from the body.

On examination, Dr. Brown found no atrophy at claimant's neck or shoulders. There was no visible swelling at the left shoulder. There was tenderness over the anterior aspect of the shoulder, specifically over the rotator cuff tendon. Claimant had mild crepitus

³ Zimmerman Depo. at 12.

⁴ American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

present on active movement. Range of motion of the left shoulder was somewhat limited. The acromial impingement sign was positive.

Dr. Brown diagnosed claimant with rotator cuff syndrome and acromial impingement. Dr. Brown believed claimant needed additional treatment and recommended he be referred to an orthopedic surgeon who specialized in upper extremity problems. Dr. Brown also believed claimant should have an MRI of the shoulder and possibly x-rays, physical therapy, and anti-inflammatory medications or injections. He recommended that claimant continue to refrain from the use of the hand above chest level or reach away from the body more than 18 inches.

When asked if claimant's condition could be caused by gout, Dr. Brown said that gout involves all joints. But he said it was uncommon that gout would involve a shoulder joint. He said although it is possible claimant's condition was gout, it is more likely it is rotator cuff syndrome, an inflammation usually starting with a sprain, strain or overuse involving the rotator cuff. Rotator cuff syndrome commonly comes about with a single lifting injury or as a result of repeated injuries over a long period of time. Dr. Brown attributes claimant's acromial impingement and rotator cuff tendonitis with claimant's work history. He stated that claimant's work was severe enough to cause rotator cuff syndrome, and frequently symptoms of rotator cuff syndrome are not significant until the following day, or even later.

Dr. Brown said that claimant was at MMI, assuming he was not seeking or desiring treatment.⁵ Based on the *AMA Guides*, Dr. Brown rated claimant as having an 8 percent permanent partial impairment of the left shoulder on the basis of loss of range of motion. He rated claimant as having an additional 6 percent impairment for crepitus on active range of motion. Those values combine for a total 14 percent permanent partial impairment to the left upper extremity at the level of the shoulder, which Dr. Brown believes is a result of the repetitive work claimant performed up to May 31, 2009.

Dr. Peter Bieri was trained in disability evaluation with emphasis on the *AMA Guides*. At the request of claimant's attorney, he evaluated claimant on February 18, 2010. Dr. Bieri's history indicated claimant said he was working in a job that required him to move 40 to 50 pound boxes at shoulder and overhead levels and that at 3 p.m. on the day he was injured he experienced some type of injury. Dr. Bieri's handwritten notes indicate that claimant said his left shoulder must have been injured then. Claimant said he was lightheaded, then went home on advice from his employer. Claimant told Dr. Bieri

⁵ Claimant twice sought an order for medical treatment from the ALJ but his request was denied both times. ALJ Order (Aug. 20, 2009) at 2; ALJ Order (Oct. 27, 2009) at 1. Those denials were affirmed on appeal to the Board. *Kelly v. Associated Wholesale Grocers*, No. 1,046,045, 2009 WL 3710753 (Kan. WCAB Oct. 28, 2009); *Kelly v. Associated Wholesale Grocers*, No. 1,046,045, 2010 WL 517333 (Kan. WCAB Jan. 25, 2010).

that the next day his shoulder was swollen and painful. At the time Dr. Bieri saw claimant in February 2010, claimant had not received treatment from any medical provider.

Dr. Bieri said the complaints claimant made at the time of the examination were subjective in nature. There was no swelling in or around claimant's left shoulder. Claimant had no atrophy. Deep tendon reflexes were normal. He had no loss of sensation. Claimant's grip was normal, and his distal active range of motion was full and unrestricted. Dr. Bieri made no recommendations for medical treatment.

Based on claimant's history and examination, Dr. Bieri diagnosed him with impingement syndrome of the shoulder and possible rotator cuff pathology. Dr. Bieri related that diagnosis with the history of injury given him by claimant. Dr. Bieri was not aware of any other physical cause which could have caused claimant's injury. He indicated that claimant denied any other incidents, injury or illness in that area. Dr. Bieri said it would not be unusual for someone who has suffered a shoulder injury to notice symptoms of the injury the next day, depending on the mechanism of injury. If the injury was caused by routine activity, such as repetitive use that may not involve a traumatic event, it is similar to muscle pain one might describe the day after running or doing some kind of extended activity.

Dr. Bieri believes that claimant is at MMI. He said that claimant's condition is stable and unlikely to change. Using the *AMA Guides*, Dr. Bieri rated claimant as having a 7 percent permanent partial impairment to the left upper extremity for range of motion deficits of the left shoulder. Additionally, Dr. Bieri rated claimant as having a 2 percent impairment for pain and weakness. The combined left upper extremity impairment was 9 percent. Dr. Bieri attributes all the impairment to claimant's work-related injury. Dr. Bieri made no recommendations for future medical treatment.

Dr. Michael Hall is double board certified in orthopedics and upper extremity surgery. He examined claimant on April 27, 2010, at the request of respondent. Claimant gave Dr. Hall a history that his job entailed lifting 40 to 50 pound boxes and stacking above his head. At the beginning of the day on May 31, 2009, claimant said he did not feel well, and he drank an energy drink. He tried to work but around 3 p.m. he felt dizzy and lightheaded. He said he thought he had something wrong with his shoulder but could not know for sure. Claimant said he was checked by an EMT and was given a choice of going to the emergency room or going home. Claimant chose to go home. When he woke up the next morning, he had swelling and discomfort to the anterior part of his left shoulder. He went back to work two days later and talked to respondent's safety supervisor, who told claimant to take care of it on his own.

Claimant told Dr. Hall he continues to have pain on the front of his shoulder that radiates up towards the AC joint towards the top of his shoulder and sometimes down his arm. Claimant said the pain keeps him from pushing objects, such as a lawn mower. Claimant also told Dr. Hall he has trouble working above his head and that holding a cup

of coffee hurts. Claimant has not had treatment for his shoulder, and it has not gotten any better. He tries to avoid use of the arm.

On examination, Dr. Hall found no areas of atrophy or swelling around the shoulder girdle. Claimant had some mild tenderness along the anterior aspect of the pectoralis major and along the top of the shoulder by the AC joint. He had mild impingement signs and some limitation in range of motion. X-rays were taken, which showed claimant had AC arthrosis. Dr. Hall diagnosed claimant with shoulder pain and AC arthrosis.

Dr. Hall said in reviewing claimant's medical reports and the transcript of the August 19, 2009, preliminary hearing, he had six different scenarios for claimant's injury.⁶ He believed Lynn Hurt's version that claimant did not have pain at the time of his injury. Because claimant had six scenarios surrounding his injury, Dr. Hall did not believe claimant's shoulder was injured at work. Dr. Hall said swelling is not a complaint associated with impingement syndrome, but swelling and tenderness require a significant injury such as a blow, tear, surgery or dislocation. He has never seen an impingement patient with swelling. He opined that a patient who is injured enough to have swelling in the front of the shoulder would have had pain from the onset of the injury. Pain and stiffness, however, can develop the day after an event.

Dr. Hall stated that at the time of his examination, claimant had a little shoulder pain that may have been impingement, but he had not worked at respondent for months and was working another job. Dr. Hall stated that he did not believe claimant's symptoms were related to his work at respondent. He believed claimant was suffering possibly from mild impingement, but he did not believe what claimant was suffering from on April 27, 2010, was related to his job at respondent, based on his medical examination and the medical reports and testimony he reviewed.

Based on the *AMA Guides*, Dr. Hall rated claimant as having a 7 percent permanent partial impairment to the left upper extremity for range of motion limitation, but he did not think that impairment was related to claimant's work at respondent. He used Dr. Bieri's results to calculate the rating. Dr. Hall performed range of motion studies on claimant but did not use a measuring device. Instead, he "eyeballed" it.⁷ Dr. Hall did not give claimant a rating for pain or weakness.

⁶ Dr. Hall acknowledged that he read the medical reports of Drs. Bieri, Brown and Zimmerman but did not read the transcripts of their deposition testimony. (Hall Depo. at 22).

⁷ Hall Depo. at 17.

PRINCIPLES OF LAW

K.S.A. 2010 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2010 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.⁸ Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.⁹

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.¹⁰

ANALYSIS

The ALJ reasoned in part:

The claimant maintained that he injured his shoulder from unusually hard work on May 31, 2009 and the day before. He said he was filling a lot of orders of 200 pieces, which evidently kept him continuously moving boxes in one place for

⁸ K.S.A. 2010 Supp. 44-501(a).

⁹ *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

¹⁰ *Id.* at 278.

more time than was typical. It should also be noted that May 31, 2009 was an unusually short work day. The claimant's shift started at 12:30 p.m. and he met with the EMT around 3:00 p.m.

The respondent had the claimant examined by Dr. Hall, an orthopedic surgeon specializing in hand and upper extremity injuries. Dr. Hall assessed the claimant with shoulder pain and AC arthrosis. He also felt the claimant may have a mild impingement syndrome. Hall did not think the claimant's shoulder problems were due to a work injury, because the claimant didn't notice any shoulder problems while working. He succinctly put it, "When someone hurts a shoulder, they know it." Hall also took issue with the claimant's report of having swelling the following day. Hall said that swelling would indicate "a significant injury, a blow, a tear, a surgery, a dislocation" that the person would definitely notice at the time it happened. Hall rated the claimant's permanent impairment at 7% of the upper extremity.

The claimant offered testimony from three different physicians who felt the claimant's shoulder was injured by his job duties and did not think it was unusual for symptoms to appear hours after the claimant had stopped working. All of these physicians, at least initially, were presented a history of the claimant developing pain in his shoulder while on the job, but maintained their causation opinions even when considering that the symptoms developed later, at home.

. . . .

Apparently, medical experts do not agree on whether a person should notice a shoulder injury when it occurs. From a common sense perspective, it is conceivable the claimant could hurt a shoulder doing this job, which involved lifting a lot of boxes. However, it is not reasonably conceivable that damage to the shoulder, even if it was damage that occurred gradually, would remain asymptomatic for the whole three months the claimant worked, then become symptomatic hours after the end of a short work day while the claimant was home resting. The court does not find a preponderance of credible evidence that the claimant's left shoulder problem arose out of and in the course of employment.¹¹

Having considered the entire record, the Board agrees with the ALJ's analysis and conclusions. The symptoms claimant reported to his supervisor and to the EMT on May 31, 2009, were not consistent with a shoulder injury. Moreover, claimant never reported any shoulder symptoms during his period of employment with respondent through May 31, 2009.

¹¹ ALJ Award (Sept. 20, 2010) at 3.

CONCLUSION

Claimant failed to prove he suffered personal injury by accident arising out of and in the course of his employment with respondent. Accordingly, the remaining issues are moot.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Kenneth J. Hursh dated September 20, 2010, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of April, 2011.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Bruce Alan Brumley, Attorney for Claimant
Frederick J. Greenbaum, Attorney for the Self-Insured Respondent
Kenneth J. Hursh, Administrative Law Judge